eminently endowed beyond all their contemporaries, and moved by the invisible agency of God, to enlighten the world on subjects, which had never till they spoke, occupied the minds of men. In other words, we believe that the appearance of such men, at the exact times when all things were ready for the disclosures they were to make, was not the result of accident, but the work of an overruling Providence. And if such has been the beneficent operation of Providence upon the minds of men in all past times,—if whenever a revelation was needed, He has communicated it, and in the exact measure in which it was needed,—how can we, without irreverence, adopt any other conclusion, than that He, who changeth not, will still continue, through all future time, to make known through gifted men, as fast as the world is prepared to receive them, new truths from His exhaustless store?

ART. VI.—*The Cherokee Case.*

1. *Opinion of the Supreme Court of the United States on an Application made by the Cherokee Indians for a Writ of Injunction against the State of Georgia, delivered by* Mr. Chief Justice MARSHALL, *at the January Term held at Washington*, 1831.
2. *Message from the President of the United States in compliance with a Resolution of the Senate, relative to the execution of the Act of March* 30, 1802, *to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers, transmitted to the Senate on the 22d of February*, 1831.

The proceedings of the Supreme Court of the United States, upon the application made by the Cherokee Indians for a writ of injunction against the State of Georgia, excited a deep and general interest throughout the country. This was naturally to be expected from the novelty of the case, the dignity of the parties, and the high importance of the principles in question. The scene wore in some degree the imposing majesty of those ancient debates in which the great father of Roman eloquence sustained before the Senate the rights of allied and dependent, but still sovereign princes, who had found themselves compelled to seek for protection and redress

from the justice of the mighty Republic. We may add, that the high and well-earned reputation of the Counsel retained by the Indians, added another point of resemblance to the parallel. In proportion to the interest felt in the subject, was the anxiety to learn the opinion of the Court, which was given by the Chief Justice, on the last day of the January term, and was shortly after published in the Cherokee Phœnix. We propose in the present article to submit to our readers a few observations upon this opinion; and shall afterwards examine very briefly the defence of the policy of the Executive Department of the Government in regard to the Indians, which is contained in the message transmitted by the President to the Senate on the 22d of February, in answer to a call for information on that subject. The opinion of the Court,—which, on account of its great importance, we copy entire,—is as follows.

'*The Cherokee Nation* vs. *The State of Georgia. January Term*, 1831.

'Opinion of the Supreme Court of the United States, delivered by Mr. Chief Justice Marshall, on a motion of the Cherokee nation for a writ of injunction and subpœna against the State of Georgia.

'This bill is brought by the Cherokee nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State, which, as alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

'If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent; found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guaranty of the residue, until they retain no more of their former extensive territory than is necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

'Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this Court jurisdiction of the case?

'The third article of the Constitution describes the extent of the judicial power. The second section closes an enumeration

of the cases to which it is extended, with "controversies" "between a State, or the citizens thereof, and foreign States, citizens or subjects." A subsequent clause of the same gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may then unquestionably be such in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign State, in the sense in which that term is used in the Constitution?

'The Counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State, from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our Government plainly recognise the Cherokee nation as a State, and the Courts are bound by those acts.

'A question of much more difficulty remains. Do the Cherokees constitute a foreign State in the sense of the Constitution?

'Their Counsel have shown conclusively that they are not a State of the Union, and insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a State, must, they say, be a foreign State. Each individual being foreign, the whole must be foreign.

'This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance, are foreign to each other. The term foreign nations is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions, which exist no where else.

'The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citi-

zens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States have the sole and exclusive right of regulating the trade with them, and of managing all their affairs, as they think proper, and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the Constitution, "to send a deputy of their choice, whenever they think fit, to Congress." Treaties were made with some tribes by the State of New York, under a then unsettled construction of the Confederation, by which they ceded all their lands to the State, taking back a limited grant to themselves, in which they admit their dependence.

'Though the Indians are acknowledged to have an unquestionable and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our Government, yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection, rely upon its power, appeal to it for relief to their wants, and address the President as their Great Father. They and their country are considered by foreign nations as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

'These considerations go far to support the opinion, that the framers of our Constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign States.

'In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American Court of justice for an assertion of right or a redress of wrongs had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the Government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the Courts of the Union. Be this as it may, the peculiar relations between the

United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign State, were there no other part of the Constitution which might shed light on the meaning of these words.

'But we think in construing them, considerable aid is furnished by that clause in the eighth section of the third article, which empowers Congress to "regulate commerce with foreign nations, among the several States, and with the Indian tribes."

'In this clause, they are as clearly contra-distinguished by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation, and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in a construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes,—foreign nations, the several States, and Indian tribes. When framing this article, the Convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

'The counsel for the plaintiffs contend, that the words "Indian tribes" were introduced into the article empowering Congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the Confederation. Intending to give the whole power of managing those affairs to the Government about to be instituted, the Convention confined it explicitly, and omitted those qualifications which embarrassed the exercise of it as granted in the Confederation. This may be admitted, without weakening the construction which has been intimated. Had the Indian tribes been foreign nations in the view of the Convention, this exclusive power of regulating intercourse with them might have been, and most probably would have been specifically given, in language contra-distinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several States." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

'It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument. Their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in

which it is used in any sentence, is to be determined by the context. This may not be equally true with respect to proper names. Foreign nations is a general term, the application of which to Indian tribes, when used in the American Constitution, is at best extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contra-distinguishing them from each other. We perceive plainly, that the Constitution in this article does not comprehend the Indian tribes in the general term,—foreign nations; not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When afterwards the term foreign State is introduced, we cannot impute to the Convention the intention to desert its former meaning and to comprehend Indian tribes within it, unless the context forces that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

'The Court has bestowed its best attention on this question, and after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not a foreign State in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.

'A serious additional objection exists to the jurisdiction of the Court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from a forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies. On several of the matters alluded to in the bill, for example, on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this Court cannot interpose, at least in the form in which those matters are presented. That part of the bill which respects the lands occupied by the Indians, and prays the aid of the Court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this Court in a proper case with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the legislation of Georgia, and to restrain the execution of its physical force. The propriety of such an interposition by the Court may be well questioned. It savors too much of exercise of political power, to be within the province of the Judicial Department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

'If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to

be apprehended, this is not the tribunal which can redress the past or prevent the future.

'The motion for an injunction is denied.'

Some political writers who sustain the pretensions of the State of Georgia, have affected to represent this opinion as a decision in her favor and that of the Executive upon the merits of the case. It must be obvious, however, to every reader, that this representation is wholly incorrect. The Court, on the contrary, intimate very strongly that their opinion on the merits of the case is in favor of the Indians. 'If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent; found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, *each of which contains a solemn guaranty of the remainder*, until they retain no more of their former extensive territory, than is necessary to their comfortable subsistence. *To preserve this remnant, the present application is made.*' Again. '*The Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government.*' If we are not mistaken in the import of language, which appears to be sufficiently intelligible, these phrases convey a very strong intimation, that the opinion of the Court on the merits of the case is in favor of the Cherokees; and as the Chief Justice also intimates, that the Court would have it in their power to take cognizance of the case if brought in another form, we presume that the necessary measures will be forthwith adopted, for ascertaining this opinion in a still more direct and positive way.

But whatever may be the judgment of the Court upon the merits of the case when it shall be given, it is certain, as we have remarked, that the case was not decided on its merits at the late trial. It went off upon a point of mere form. The Cherokees came into Court describing themselves as a *foreign State*, and claiming to be heard as such. The Court decided that they were not a *foreign State* within the meaning of the term as used in the Constitution, and that they were, consequently, not entitled to a hearing as such. The Court intimated, that the bill filed by the Cherokees was in other

respects defective in form, but the point just mentioned was the one upon which the decision was given.

Although it is certainly much to be regretted, that a case of this importance should have been decided upon any other principle than that of doing substantial justice between the parties, we were, nevertheless, by no means unprepared for this result, or very greatly disappointed when it happened. The forms of proceedings at law are so complicated and uncertain, that when a case is at all out of the common routine of practice, it is a matter of chance rather than skill, whether the shape in which it is first presented, be or be not unexceptionable. This particular case was one of very great difficulty; the Counsel had no precedents directly in point to guide them, and notwithstanding their acknowledged ability and diligence, it was perhaps hardly to be expected that they should completely succeed at the first trial. We had, in fact, anticipated some of the objections made by the Court to the form of the bill. We greatly doubted, in particular, whether the attempt to restrain a State by injunction, from enacting laws, for whatever purpose, would be within the competence of the Federal Courts. The Court, without directly deciding this point, distinctly intimate, that if they had had occasion to do so, they should have decided it in the negative. 'The bill,' says the Chief Justice, 'requires us to control the legislation of Georgia, and to restrain the *execution* (?) of its physical force. The propriety of such an interposition by the Court may well be questioned. It savors too much of exercise of political power, to be within the province of the Judicial department. But the opinion on the other point makes it unnecessary to decide this question.'

We were, therefore, prepared to hear, without much disappointment, that the case had gone off upon a point of mere form; but we confess that we were not prepared for the precise objection that was taken by the Court. With all our respect for the ability and learning of the members of this tribunal, and with every disposition to render the fullest justice to their integrity and independence, we are compelled to say, that this objection does not appear to us to be tenable. We are bound, perhaps, to suppose, that in differing from so high an authority, we must be mistaken. But as the case turns not on recondite points of law learning, but on the construction of a public document, which, as all admit, must be interpreted

without regard to technical niceties by the rules of plain common sense, we shall venture to state very briefly the grounds of our opinion. We do this, not for the purpose of creating discontent at the judgment of the Court, in which all the parties interested, and the people at large, will acquiesce with cheerfulness, but of lending such feeble aid as may be in our power, in the illustration of a most curious and important question of constitutional and international law.

The ground on which the case was decided, as our readers will perceive on recurring to the opinion of the Court, is simply this. The Cherokees come into Court, describing themselves as a foreign State, and claiming to be heard as such. The Court decide, for reasons alleged in the opinion, and without prejudging in any way the merits of the case, that they are not a foreign State, within the meaning of that phrase as used in the Constitution, and cannot of course be heard in that quality. We proceed to examine the validity of these reasons.

We may remark, in the first place, that the Court admit very fully in the outset, that the Cherokees are a State;—that is, a distinct political society, recognised as such by the Government. The language of the opinion on this point is explicit.

'So much of the argument of the Counsel for the plaintiffs, as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the Judges, been completely successful. They have been uniformly treated as a State, from the settlement of the country. The numerous treaties made with them, by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. *The acts of our Government plainly recognise the Cherokees as a State, and the Courts are bound by these acts.*'

The Cherokees are thus distinctly admitted to be a State; that is, a distinct political society. In making this admission, the Court appear to us to have given up in advance the only ground upon which it could be maintained, that they are not

a *foreign* State. The circumstances which are afterwards mentioned as tending to show that they are not foreigners, and particularly, the relation of pupilage, in which they are supposed to stand to the United States, would seem to prove,—if they prove any thing to the present purpose,—that they are not a distinct political society. This point, though it could not be made out, might, we think, be argued with some plausibility; but this point is, as we have seen, conceded in advance by the Court. The Cherokees are admitted, in the most explicit terms, to be a State.

How then, can it be denied that they are a foreign State? The epithet *foreign* means nothing more in reference to States, than *other*, in reference to individuals. A State which is not the United States, or any one of them, is necessarily and *ex vi termini* a foreign State, just as an individual, who is not myself, is necessarily another person. There is no possible middle term between these two categories. The Court, in substance, admit this. 'In the general,' says the Chief Justice, 'nations, not owing a common allegiance, are foreign to each other. The term foreign is with strict propriety applicable by either to the other.' The Court do not appear to have felt, that the term *foreign* is not only applicable with strict propriety by either of two nations, not owing a common allegiance, to the other, but that this is the only idea implied in the term; and that for either of two nations so situated, to refuse that title to the other, would involve the same absurdity, as for the individual A, to deny that his neighbors B, C, and D, were other persons. But the remark of the Court, though it does not indicate the full strength of the case, is quite sufficient for our purpose.

It is admitted then, by the Court, that the Cherokees are a State; and that 'in the general,' that is, according to the ordinary use of language, they are a foreign State. But it is an acknowledged principle, that the Constitution is to be construed according to the ordinary use of language. Such being the case, the necessary conclusion seems to be, that the Cherokees are a foreign State, within the meaning of the Constitution.

This is denied by the Court on two grounds. First, because 'the relation of the Indians to the United States is marked by peculiar and cardinal distinctions, which exist no where else, and which render it doubtful, whether they can, with strict accuracy, be denominated foreign nations;' and secondly,

because in the clause of the Constitution, which authorizes Congress to regulate commerce, a distinction is expressly taken between foreign nations and Indian tribes. 'Congress shall have power to regulate commerce with foreign nations, among the States, and with the Indian tribes.'

As respects the 'peculiar and cardinal distinctions,' belonging to the relation between the Indians and the United States, we repeat what we have intimated above, that the circumstances here alluded to prove,—if they affect the argument at all,—not that the Indians are not foreigners, but that they are not a State. That their territory is surrounded on all sides by ours; that we claim a right in fee in their lands, and only acknowledge in them a right of occupancy; that we should regard it as an act of hostility in any other nation to acquire their lands, or attempt to form a political connexion with them; that they look to our Government for protection, and address the President as their Great Father; that their relation to the United States resembles that of a ward to his guardian;—these are all circumstances, which, so far as they bear upon the question, tend to show, that these people are not sovereign; that they are not a *State*. Such, accordingly, is the view taken of the matter, in the late opinion of the Convention of the Georgia Judges in the case of Tassel. It is there argued, that for reasons substantially the same with those here stated by the Court, the Cherokees are not a *sovereign State*. It does not seem to have occurred to the Georgia Judges, who were yet not remiss in seeking for arguments in defence of the pretensions of the State, that if the Cherokees were a State, it would be possible to deny them the character of a foreign State. The ground taken by the Georgia Judges, although we deem it untenable, seems to us more plausible than the one taken by the Supreme Court. But it is unnecessary for our present purpose to inquire, how far the peculiar relations existing between the United States and the Indians diminish the right of the latter to be styled and treated as a sovereign State, because this right is distinctly admitted by the Court. This being the case, their right to the qualification of *foreign*, with all its incidents, follows of course.

The peculiar character of the relations between the Indians and the United States, although it might with some plausibility be supposed to impair their claim to be considered a sovereign State, has therefore no tendency to show, that being by

acknowledgment a sovereign State, they are not *foreign*. They are clearly then within the letter of the Constitution Are they also within its spirit and meaning, or is there some thing in the nature of their relations, as described by the Court, which tends to show, that, although the Indians come within the general description of foreigners, it was not intended by the framers of the Constitution, that they should enjoy the advantages secured to foreigners by the clause under consideration? On our view of the subject, the case is directly the reverse. The relation between the Indians and the United States, created by the circumstances mentioned in the opinion of the Court, is much more close than that which exists between the United States and any other foreign nation. A State, of which the territory is wholly surrounded by ours,—*enclavé*, in the French phrase, within our dominions,—which is connected by various political and personal relations of the most intimate character with the General and State Governments, and with the individual citizens, is of course much more likely to have occasion to take advantage of the faculty of suing in our courts, than those which are situated at a distance, and maintain with us much less intimate relations. Is it probable, then, that the framers of the Constitution, when they inserted a clause which gives to foreign States the right of suing in the Federal Court, intended to exclude those foreign States which would probably have the most frequent occasion to use it, and include those only which would have the least? We think not.

Again; if foreign States were not allowed to sue in the Federal Courts, they would be obliged to sue in those of the States; and the reason why the Constitution secures to them the privilege of suing in the Federal Courts is, that the Federal Government is the only representative of the nation for all its foreign relations. The administration of justice in the State Courts might not be uniform throughout the country, and it was proper that foreigners, in dealing with different individuals belonging to the same nation, should have the benefit of a uniform legislation. But this reason operates with as much force in regard to the Indians as to any other foreigners; and the fact, that the relations with them were committed exclusively to the management of the General Government, is a sufficient proof that such was the opinion of the framers of the Constitution. Indeed, the reason of the case in this view of it, as in the other, is not only equally strong, but much stronger

in regard to the Indians, than to any other foreigners. It might certainly have been expected, as has in fact happened, that the Indians might have other reasons for preferring to sue in the Federal, rather than the State Courts, beside the danger of a want of uniformity in the judgments of the latter; and it would have been particularly unjust and unreasonable not to extend to the class of foreigners to whom it was on every account more especially necessary, the appropriate remedy for the defects of these tribunals.

The Court finally remark, that 'At the time when the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk or to the Government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the United States.' But although the state of civilization among the Indians at the time when the Constitution was framed, might have furnished a plausible reason for the omission of them in this enumeration, had they in fact been omitted, we cannot think that it furnishes any reason whatever for refusing to allow them the benefit of a clause, which is admitted to include them according to the ordinary and usual acceptation of the terms. It was certainly not the intention of the framers of the Constitution to give the right of suing in the Federal Courts to such foreign nations only as happened at that time to be in existence, or in a condition to use it; but to establish a rule, that should operate in favor of all foreign nations forever after. At the time when the Constitution was framed, the Spanish Colonies on our continent were not in a condition to take the benefit of this clause. It did not at that time enter into the minds of any of them, to think of claiming it; but it is not the less certain, that they now enjoy it as fully as if they were specified by name in the Constitution.

We cannot, therefore, concur with the Court in the general reasoning by which they attempt to show that the Indians are not to be considered as foreign States, for the purpose of suing in the Federal Courts. The argument drawn from the clause of the Constitution which authorizes Congress to regulate commerce, is more plausible, but to our minds not more decisive.

A distinction is there taken between foreign nations and the Indian tribes; and if there were no particular reason for making such a distinction in this clause, it would be natural to conclude that the phrase, foreign nations, is used throughout the Constitution in such a sense as to exclude the Indians. But the fact is, as the Court themselves admit, that there was a particular reason for making a distinction in this clause between foreign nations and the Indians, which does not hold in regard to other parts of the Constitution. The ninth article of the old Confederation had left it in some degree uncertain, whether the management of the relations with the Indians belonged to the General Government, or to the States; and in order to avoid any future misconstruction, it was important that they should be mentioned by name in the article conferring the authority for this purpose. On reference to the Journals of the Convention, we find that the clause, as originally reported, stood as follows: 'Congress shall have power to regulate commerce with foreign nations and among the several States.' The words, *and with the Indian tribes*, were afterwards added by way of additional security, in an amendment, and the form in which they were introduced shows at once why they were placed at the end rather than the middle of the clause. But the tenor of this clause and of the Constitution in all its parts, entirely precludes the idea, that the Indians were considered in any other light than as foreigners. Had they been regarded as in any sense subject to or dependent upon the United States, the power of governing them to the same extent must have been conferred on the General Government by a special clause. But the Constitution gives to the General Government no authority in regard to them, excepting such as it gives in regard to all foreigners. Under the authority to treat with foreign nations, the President has always treated with the Indians; under the clause which prohibits the States from treating with foreigners, the States have always abstained from treating with the Indians. And the power of regulating commerce with them,—the only one specifically conferred by the Constitution,—is also given in regard to all other foreigners. This consideration alone, if there were no other, affords sufficient evidence to satisfy our minds, that the Indians are throughout the Constitution recognised and treated as foreign States.

We will not, however, enlarge any farther on this point. Convinced as we are, that the opinion of the Court upon it is

erroneous, and regretting as we do, that the error into which we suppose them to have fallen, should have operated as a delay, and, to a certain extent, denial of justice in a most important and interesting case, we are yet disposed, as we have already remarked, to acquit the Court entirely of all neglect, sinister intention, or undue bias, and to acquiesce with perfect cheerfulness in their decision. The case will no doubt be presented to them again in a form in which they will be able to take cognizance of it, and in which it may be tried upon its merits. Under such circumstances, we cannot permit ourselves to entertain a doubt of the issue.

The merits of this case have been fully discussed on both sides of the question in previous numbers of this journal, and as they are not touched upon in the opinion of the Court, we shall not, on this occasion, enter upon them in detail. We cannot, however, refrain from a very few cursory observations upon the statement made of them in a Message from the President to the Senate of the United States, of which we have placed the title at the head of this article.

This Message was transmitted by the President on the 22d of February, in reply to a call from the Senate, made on motion of Mr. Frelinghuysen, for information, whether the act of 1802 for regulating trade and intercourse with the Indian tribes, and preserving peace on the frontiers, had been carried into effect by the Government, and if not, for what reason the Government had declined to enforce it. The President states, in reply, that he is not aware of any omission to carry into effect the provisions of the act, so far as their execution depended on the agency confided to the Executive, and then enters upon a defence of his general policy in regard to the Indians. We cannot but consider this argument as one of the least successful attempts to make the worse appear the better reason, that we have ever met with. We can imagine, though with difficulty, that there may be among intelligent and well meaning men two opinions upon this subject; but we can hardly conceive it possible, that any intelligent man can be satisfied by the reasoning of this Message.

Our readers are aware, that the treaties between the United States and Cherokee Indians (whose case led to the inquiry of the Senate) recognise these Indians as a nation, guaranty to them the exclusive possession of, and jurisdiction over the territory marked out in the treaties, declare that they are

not under the jurisdiction of any State, stipulate that citizens of the United States shall not settle on their territory or enter it without a passport, and finally state, as one of the objects of these arrangements, the establishment by the Cherokees of fixed laws and a regular government, and the preservation of their national existence. These treaties are sixteen in number, beginning with that of Hopewell, concluded under the old Confederation in 1785, and ending with that of Washington, concluded in 1819. The act of 1802 was passed for the purpose of carrying into effect the provisions of these and the other Indian treaties. It states, among other things, that 'it shall be lawful for the President to take such measures and to employ such military force as he may judge necessary to remove from lands belonging to, or secured by treaty to any Indian tribe, any citizen who shall make a settlement thereon.' Instead of carrying into effect the provisions of the existing laws and treaties,—instead of employing the military force to remove the citizens who had intruded upon the territory of the Cherokees under a pretended authority from the State of Georgia, the President, as is well known, and as he admits himself in this Message, actually removed the troops that had previously been stationed in the Indian territory, and has used, and is still using all the means in his power to remove the Indians themselves. The reasons given in the present Message for this extraordinary course, are as follows.

1. The clause in the Constitution, respecting the employment of the military force, is not imperative.

2. The act provides, that 'nothing therein contained shall be so construed as to prevent any trade or intercourse with the Indians living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual States.' This provision the President interprets as 'prospective in its operation, and as applicable, not only to Indian tribes, which at the time of the passage of the act were subject to the jurisdiction of a State, but to such also as should thereafter become so. As soon, therefore, as Georgia had extended her jurisdiction over the Indians within her limits, orders were given to withdraw from the States the troops which had been detailed to prevent intrusion upon the Indian lands within it, and these orders have been executed.'

As to the first of these reasons, which is not much insisted

on, we shall merely remark, that the President is bound, by the Constitution and his oath of office, to take care that the laws are faithfully executed. The act of 1802 gives him the authority,—which he would, doubtless, have possessed without,—to employ the military force for this purpose in the case in question; and having this authority, he is bound by the Constitution and his oath of office to exercise it, if necessary. For a neglect of this, as of any other duty, he is liable to impeachment.

The second, which is the principal reason, supposes, of course, that the extension by Georgia of her jurisdiction over the territory and persons of the Cherokee Indians was a rightful act, and if this were the case, the reason would undoubtedly be valid. The President accordingly proceeds, in the rest of the Message, to a formal justification of the act of Georgia, and rests his defence upon his success in this attempt. But this act, as we have already remarked, is in open contravention of all the treaties with the Cherokees. The President himself, in the course of his argument, admits that such is the fact, and endeavors to remove the objection by proving, that the treaties are not valid. Without examining the reasons adduced in support of this position, which it would be easy to refute in detail, it is sufficient for our present purpose to remark, that the President, in taking upon himself to consider and decide upon the validity of treaties, quits his appropriate functions as an Executive officer, and assumes those which belong to another department of the Government. The Constitution declares, that all treaties are the supreme law of the land, any thing in the Constitution and laws of any State to the contrary notwithstanding. As a member of the Legislative department of the Government, having a negative upon the proceedings of the other branches, it is the duty of the President to form and express an opinion upon all bills, that are submitted to him during his administration. As the head of the Executive department, his functions are purely ministerial, and he has no more right to question the validity of the laws or treaties which he executes, than the marshal who acts under him. As an individual, he was, of course, at liberty to speculate at discretion upon this or any other subject. As President of the United States, he was bound by the Constitution and his oath of office to see that the treaties were faithfully executed. In neglecting to do this, from the avowed motive

that these treaties were in his opinion unconstitutional, and thus claiming a right which could only be exercised, if at all, by the Supreme Court, he has exhibited, perhaps, the first unequivocal example of an illegal assumption of power by a President to be found in our history. It is singular and surprising, that the same persons, who habitually express the strongest alarm and jealousy respecting a tendency to encroachment by any of the departments of the Federal Government, should on this occasion have abetted General Jackson in his unwarrantable pretension.

We shall not, however, at present, pursue this subject any further. We conclude with repeating the hope which we have already expressed, that the case will be presented anew to the Supreme Court in such a form, that it may be decided on its merits. Such a decision, if given at the suit of an individual, would still leave the Cherokee community unprotected in the rights which they possess as such, and would not wipe off from the national escutcheon the foul stain that now rests upon it of a breach of the public faith. It would, probably, however, involve an opinion on the constitutionality of the laws of Georgia, which would shake the basis of the President's objections to the treaties, and might induce him to reconsider his determination not to enforce them. Should he finally persist in his present course, we trust that there is enough of intelligence and virtue remaining in Congress, or in the body of the people, to show him that his duties and their plighted faith are not to be trifled with forever with impunity. We say not this from any feeling of party animosity. We respect the President as the person invested by the confidence of the nation with the Chief Magistracy of this great republic, and should rejoice to be able to give to his measures the tribute of our approbation. But when, as in this case, the honor and interest of the country are at stake, the truth must be told. We are bound to these children of the forest by solemn obligations. A violation of them would disgrace us forever. To use the energetic language of the President himself on another occasion, *they must be fulfilled.*